

E-Filed 6/6/07

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SAFRONIA DODD-OWENS, et al.,

Plaintiffs,

v.

KYPHON, INC.,

Defendant.

Case Number C 06-3988 JF (HRL)

ORDER¹ DENYING MOTION TO
DISMISS AND GRANTING IN PART
AND DENYING IN PART MOTION
FOR LEAVE TO AMEND

[re: docket no. 42, 51]

I. BACKGROUND

The original complaint in this action was filed on June 27, 2006. Plaintiffs Safronia Dodd-Owens (“Dodd-Owens”), Natalie Amaya (“Amaya”), Tera Bryer, Tiffany Socha (“Socha”), Teri Carr, and Elizabeth Glus (“Glus”) (collectively “Plaintiffs”) complained of gender discrimination by Kyphon, Inc. (“Kyphon”), on behalf of themselves and all others similarly situated. The original complaint included nine claims alleging gender and pregnancy discrimination, sexual harassment, and retaliation in violation of California and federal law.

On October 27, 2006, Plaintiffs moved for leave to amend the complaint. On November

¹ This disposition is not designated for publication and may not be cited.

9, 2006, the Court issued an order directing that the FAC be filed as of right and denying as moot Kyphon's previously-filed motions to dismiss six claims and to strike the class action allegations from the complaint. The FAC includes ten claims, of which the first two are asserted on behalf of a putative class: (1) gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*; (2) gender discrimination in violation of FEHA, Cal. Gov. Code § 12940; (3) pregnancy discrimination against Dodd-Owens in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*; (4) retaliation against Dodd-Owens in violation of Title VII, 42 U.S.C. § 2000e-3; (5) retaliation against Amaya in violation of Title VII, 42 U.S.C. § 2000e-3; (6) pregnancy discrimination against Glus in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*; (7) retaliation against Glus in violation of Title VII, 42 U.S.C. § 2000e-3 and Cal. Gov. Code § 12940(h); (8) sexual harassment against Glus in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*; (9) pregnancy discrimination against Socha in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*; and (10) retaliation against Socha in violation of Title VII, 42 U.S.C. § 2000e-3.

On November 29, 2006, Kryphon moved to dismiss the second and fourth claims to the extent that they rely on FEHA because the alleged conduct occurred outside California. On the same date, Kryphon moved to strike the class action allegations, FAC ¶¶ 20-42 ("class action allegations"), from the FAC. Plaintiffs opposed both motions. On February 5, 2007, the Court granted both motions with leave to amend. On February 9, 2007, the Court issued a separate order directing that any amended complaint be filed by March 7, 2007 ("the February 9th Order").

On March 27, 2007, Kyphon moved to dismiss the class claims and the FEHA claims because Plaintiffs had failed to file an amended complaint, and asked the Court to set a date for it to respond to the remaining individual claims. On April 20, 2007, Plaintiffs moved to file a second amended complaint out of time and opposed the motion to dismiss. Kyphon opposes the motion to file a second amended complaint. The Court heard oral argument on May 25, 2007.

II. LEGAL STANDARD

1. Dismissal Under Rule 41(b)

1 Fed. R. Civ. P. 41(b) provides that “[f]or failure of the plaintiff to prosecute or to comply
 2 with these rules or any order of court, a defendant may move for dismissal of an action or of any
 3 claim against the defendant.” The Ninth Circuit has explained:

4 Under our precedents, in order for a court to dismiss a case as a sanction, the
 5 district court must consider five factors: (1) the public’s interest in expeditious
 6 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
 7 prejudice to the defendants; (4) the public policy favoring disposition of cases on
 8 their merits; and (5) the availability of less drastic alternatives. We may affirm a
 9 dismissal where at least four factors support dismissal, . . . or where at least three
 factors ‘strongly’ support dismissal. Although it is preferred, it is not required
 that the district court make explicit findings in order to show that it has considered
 these factors and we may review the record independently to determine if the
 district court has abused its discretion.

10 *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (internal citations and
 11 quotation marks omitted).

12 2. Leave to Amend

13 A motion for leave to amend is governed by Federal Rule of Civil Procedure 15(a), which
 14 provides that “leave shall be freely given when justice so requires.” In deciding whether to grant
 15 leave to amend, the Court will consider several factors, including: (1) undue delay by the party
 16 seeking the amendment; (2) prejudice to the opposing party; (3) bad faith; (4) futility of
 17 amendment; and (5) whether the party previously has amended its pleadings. *Bonin v. Calderon*,
 18 59 F.3d 815, 845 (9th Cir. 1995).

19 III. DISCUSSION

20 Plaintiffs assert that “any delay in filing the Second Amended Complaint is due [sic] the
 21 fact that, at the time Plaintiffs were required to file their Second Amended Complaint, Plaintiffs’
 22 counsel was still investigating developments in the case, conferring with a new plaintiff and
 23 finalizing the Amended Complaint.” Opposition to Motion to Dismiss 4. Even if this is true,
 24 Plaintiffs should have moved for an extension of time to file an amended complaint. Plaintiffs
 25 describe their failure to do so as excusable neglect and assert that they were unaware of the
 26 deadline imposed by the February 9th Order. *Id.* Plaintiffs have eleven attorneys of record. The
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February 9th Order was sent to ten of them: four by email² and six by mail.³ It also was posted electronically. The text of the order is less than three lines long and is not open to misinterpretation. Accordingly, the Court concludes that counsel for Plaintiffs have not provided a reasonable explanation of their failure to comply with the Court's order.

Plaintiffs' failure to provide a reasonable explanation for their failure to comply with the February 9th Order raises a strong inference of prejudice to Kyphon. *See e.g. Yourish*, 191 F.3d at 191; *Malone v. U.S. Postal Service*, 833 F.2d 128, 131 (9th Cir. 1987). Moreover, Kyphon asserts that it is prejudiced by Plaintiffs' continued disparagement of Kyphon and by Plaintiffs' ongoing efforts to find additional plaintiffs in what they have referred to as their "\$100 Million lawsuit." Hams Decl. ¶¶ 2-3. However, even assuming prejudice, the Court concludes that the remaining factors do not weigh sufficiently in favor of Kyphon to warrant dismissal of the subject claims at the pleading stage. Public policy weighs in favor of determining this action on the merits. While dismissal arguably would assist the Court in managing its docket, it likely would not do so significantly, since, as Kyphon concedes, the action still would proceed with respect to Plaintiffs' remaining claims, and other potential plaintiffs could join the action at a later date or bring separate actions. Other, less drastic sanctions also are available. Accordingly, the Court concludes that the individual FEHA and non-FEHA class claims should not be dismissed merely because Plaintiffs failed to comply with the February 9th Order.

The Court concludes that leave to amend is appropriate as to the non-FEHA class action and individual Title VII claims. However, with respect to the amended FEHA class action claim, the Court concludes that leave should not be granted. As the Court explained in its prior order, "[i]f California-based employees participated in or ratified the alleged tortious conduct, the complaint must so state with specificity so that the Court can determine if these actions are

² The February 9th Order also was emailed to two individuals who appear to be legal assistants to two of Plaintiffs' attorneys.

³ Seven of Plaintiffs' attorneys have not registered to receive notices of docket events via electronic filing. They are hereby directed to register forthwith so that service may be made by email. *See* General Order 45 § IV.A.

sufficient to state a claim under FEHA.” February 5th Order 4. Even in Plaintiffs’ untimely amended complaint, the only class representative with alleged connections to California is the newly-added Christy Wronikowski (“Wronikowski”), who began working with Kyphon in Tennessee in August 2006 and was transferred to California in January 2007, six months after this action was filed. The proposed amended complaint does not allege the location of the alleged tortious conduct. The most reasonable inference from the allegations is that the alleged harassment occurred in Tennessee, as it alleged that Wronikowski spoke with Steve Carmody (“Carmody”), the manager who is the alleged source of the harassment, “before accepting the job at Kyphon.” Proposed Complaint ¶ 116. The proposed complaint does not allege that Carmody has a connection with California. Under these circumstances, amendment of the FEHA claim would appear to be futile. Moreover, because no other purported class representative has a connection with California, significant class composition issues likely would arise even if another representative plaintiff could allege a connection with California. While under other circumstances it might consider granting further leave to amend, given Plaintiff’s undue delay in filing their current amended complaint, Plaintiffs’ assertion that such delay was caused at least in part by counsel’s investigation of the facts and the ongoing burden of protracted motion practice to both Kyphon and to the Court, the Court declines to grant Plaintiffs yet another additional opportunity to overcome what appears to be a jurisdictional defect. Accordingly, the Court concludes that any FEHA claims against Kyphon, if such viable claims do exist, should be brought in separate actions.

IV. ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED that the motion to dismiss is DENIED and that the motion for leave to amend is GRANTED IN PART and DENIED IN PART. Plaintiff shall file an amended complaint consistent with this order on or before June 12, 2007. The parties shall appear for a case management conference on June 29, 2007 at 10.30 a.m.

1 DATED: June 6, 2007.

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4 JEREMY FOGEL
5 United States District Judge
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